

CROSS EXAMINATION TECHNIQUES AND SKILLS (WITH AN EYE ON DRUG CASES)

John A. Lentine
Sheffield & Lentine, P.C.
Suite 301, 600 20th St. No.
Birmingham AL. 35203
205-328-1365/john@sheffieldlentine.com

1



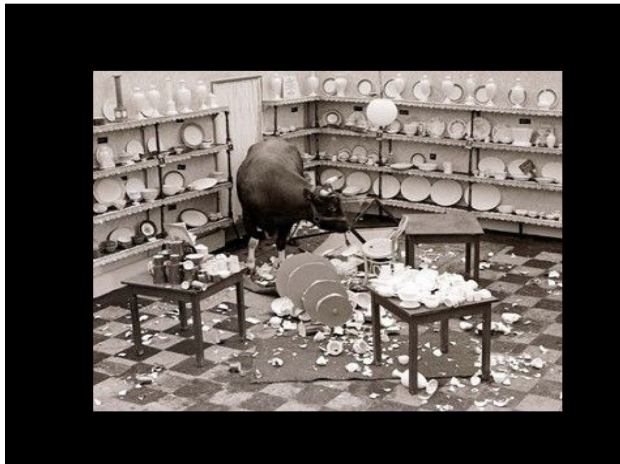
2



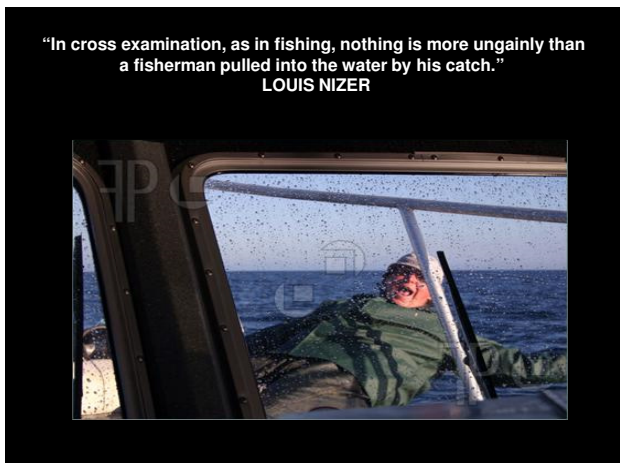
3



4



5



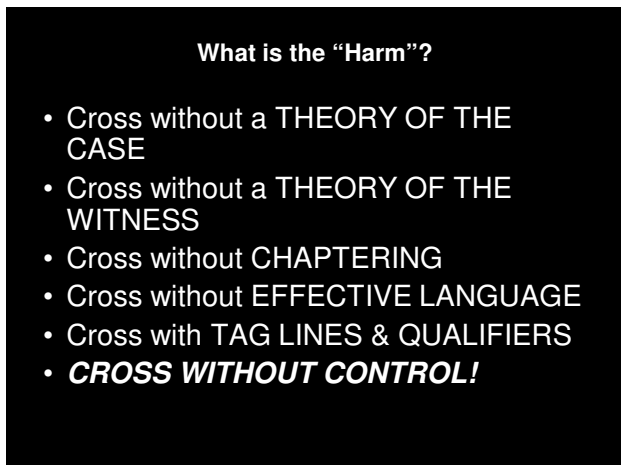
6



7



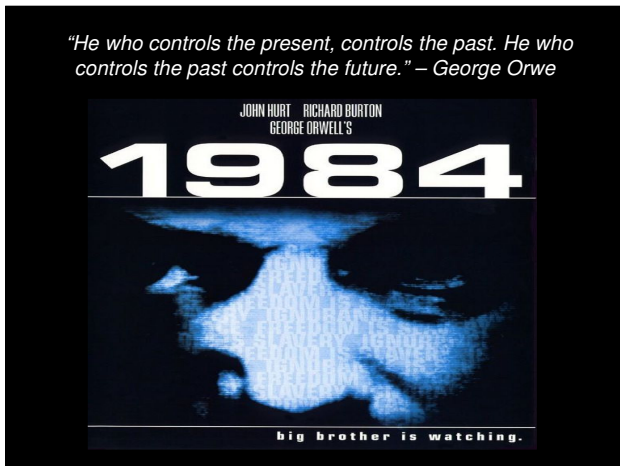
8



9



10



11

When to **CROSS??**

- When it **ADVANCES** the **THEORY OF THE CASE**
- Regardless if you label it
- **CONSTRUCTIVE** OR
- **DESTRUCTIVE**
- IF IT DOES NEITHER, THEN DON'T!
- **NO CROSS CAN SOMETIMES BE THE BEST CROSS**

12

THE THEORY OF THE CASE

- What this case is about....
- Answers the overriding question? WHY!!!??
- A single persuasive common sense story that encompasses the facts (GOOD & BAD), the legal defense and the emotion of your client's innocence, lack of guilt or lesser culpability
- T of C depends on the facts, the law, the emotion of the case and is unique to each case.

13

PREPARATION FOR CROSS

- Where does the witness fit in your OVERALL T of C?
- What is needed from the witness in cross that advances that T of C?
- What is your Theory of this Witness that you want jury to adopt (i.e. biased, lying, mistaken, incompetent, etc.)
- Is the cross DESTRUCTIVE? CONSTRUCTIVE? OR BOTH?
- Set up each CHAPTER of the cross with the HEADLINES of each CHAPTER for understandable TRANSITION from one to the other
- But leave room for the **GOLDEN NUGGETS** that appear from direct (NEVER HEARD THAT BEFORE) (Chapters on the FLY!)

14

GOAL OF CROSS

- To **ADVANCE** your T of C BY
- Crossing in logical (common sense) progression to a specific goal that fits within your Theory of the Case and of the Theory of that witness
- **ACCOMPLISHED BY FOLLOWING THREE RULES**

15

THE THREE RULES OF CROSS EXAMINATION

- LEADING STATEMENTS ONLY
- ONLY 1 NEW FACT PER STATEMENT
- ORGANIZED INTO CHAPTERS, WHERE CROSS LEADS TO A SPECIFIC THEORY CENTRIC GOAL, FROM THE GENERAL TO THE SPECIFIC

16

RULE #1 – LEADING STATEMENTS ONLY

- NO open ended Qs
- WHO, WHAT, WHERE, WHEN, WHY, HOW OR DID – **ALL GONE!**
- In fact NO Q's at ALL!
- NO Tag lines, prefixes, suffixes qualifiers in the front end ("Good morning, I will be your cross examiner today") or the back end (isn't that correct, isn't that true, correct, right, etc.)
- SHORT
- STATEMENT (All about the inflection!)

17

RULE # 2 – ONLY 1 NEW FACT PER

- Start with the Broad or General Chapter Statement – "I'm going to ask you some questions about...."
- Then a **fact**
- A fact **NOT** a conclusion
- Then add 1 new fact to the next statement, but only 1 new fact
- Don't overload with facts because guaranteed to lose control
- THINK.....

18

WWSD! WHAT WOULD SHELDON DO!!??



19

Basic Cross Formula
(S (1FP) + S = C)

Advanced Cross
Formula
(S (1NFP) + S = C)

20

“ THE OLD & BUSTED METHOD ”

“After the robbery you saw the robber get into the passenger side of a blue 2 door Honda Accord and speed away, isn't that correct?”

21

THE “NEW HOTNESS” METHOD

- **PREFACE of CHAPTER** – “I’m going to ask you some questions about what you saw after the robbery, understand.
- You saw the robber.
- The robber you saw got into a car.
- The robber you saw got into the passenger side of a car.
- The car the robber got into the passenger side of was a Honda
- A Honda accord
- Blue.
- And it sped away.

22

PRACTICING THE LEADING STATEMENTS TECHNIQUE

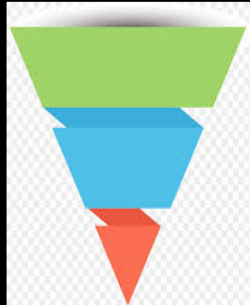
- You must PRACTICE
- Start with...
- EVERYONE (Family, friends, whomever...)
- ANY WHERE AND ANY PLACE
- AND ANY TIME
- REMEMBER.....

23

**IF YOU ARE
PERSISTENT,
YOU WILL GET IT.
IF YOU ARE
CONSISTENT,
YOU WILL KEEP IT.**

24

RULE #3 - ORGANIZING CHAPTERS TO A SPECIFIC THEORY CENTRIC GOAL AND THEN PROCEEDING FROM THE GENERAL TO THE SPECIFIC



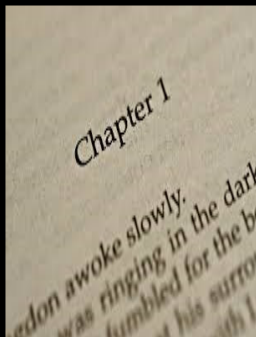
25

WHAT IS A CHAPTER?

**GOAL ORIENTED SECTIONS
WITHIN THE OVERALL
CROSS DESIGNED TO
ESTABLISH ONE OR
PARTICULAR POINT(S)
NECESSARY TO YOUR
THEORY OF THE CASE!!!!**

26

HOW TO CHAPTER



- Diagram/Flow chart what you want and how you want the witness to be seen within the OVERALL story you are telling
- Think about the story you are telling (structure) and the **arc** of the story with each witness (moving the witness from one situation to another within the story)
- Be sure to **SOURCE** the facts for each witness' cross

27

SOURCING

- A Source is where the fact comes from
- Witness' statements, police reports, depositions, etc.,
- Allows you to access it immediately for use if necessary typically for impeachment of a witness
- Create a system or code for each source within your cross notes
- DEP. PG 10, LINES 12-15
- PR. Narrative, PG 2, LINE 4-5

28

HOW TO MAKE CHAPTERS THEORY DRIVEN IN CROSS?

Write out a "clear" theory

Use a "Who is this witness" analysis

Understand the witness' motivations, think through:

Who is the witness

How does the witness want to be perceived

How do you need the witness to be perceived

Think about how the witness can help drive your theory

Write out your "Theory of the witness" with T of C

29

INTERNAL CHAPTER CONSTRUCTION

- General to Specific, Broad to Narrow
 - CREDIT THE WITNESS (Set up to Impeachment)
 - IMPEACHMENT
 - STORYTELING THROUGH THE CROSS
 - A chapter that tells a scene by painting the picture of the story you want to tell
 - A cluster of chapters that tells the story of an idea, an event, etc.
- Remember ONE CHAPTER PER PAGE

30

STRUCTURE CHAPTERS REMEMBERING RULES 1 & 2

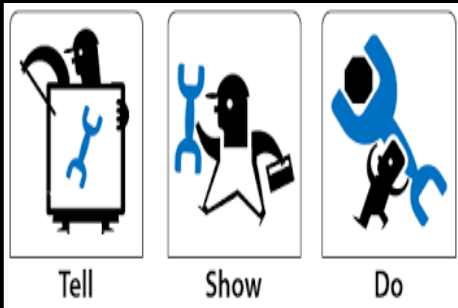
You are Training and
Teaching the witness
how to answer

Like teaching
Kindergarten

Start SIMPLE and stay
FIRM



31



32

LANGUAGE/RULES OF CROSS- 1 MORE TIME!

- **SHORT** (Very short, only.....)
- **1 FACT PER** (Fact not Argument) or **1 NEW FACT PER +**
- **STATEMENT** (Not questions, don't ask questions)
=
- **CONTROL**
- **GENERAL TO THE SPECIFIC** – Logical progression to the specific goal(s)
- Simple words not subject to interpretation
- Using **GOAL ORIENTED CHAPTERS**
- Dump intros and tag line endings

33

The DON'TS

- Don't Rehash direct
- Don't beat a dead horse/"Leave a tender moment alone" (BILLY JOEL)
- Don't ask open ended questions (loss of control)
- Don't cross without a purpose, goal and theory of that witness that fits within the overall theory of the case
- Control is the key
- If takes more than 5 seconds to ask its lousy if it takes longer its even *worse*

34



35

The USUAL SUSPECTS

Law Enforcement

Confidential Informant

Forensic Analyst

36

LAW ENFORCEMENT

Start with Theory of the Witness

What does the evidence show or not show, what was done or not done or should have been done

Are they Incompetent, Lazy, a Liar??

Once you decide who the witness is then craft the cross around that narrative

Look for the impeachments, inconsistent statements, omissions in reports, then use them to illustrate your narrative

For incompetent or lazy officer consider using the Antithesis model

"We can agree you're a PROFESSIONAL"

37

THE CI'S

Start with Theory of the Witness

Start with their MOTIVATION and OBVIOUS BIAS, but look for the lack of corroboration

Once you decide who the witness is, then craft the cross around that narrative

Look for the impeachments, inconsistent statements, etc.

Look for the priors and the pendings

Prepare by Motion for Impeaching Info on CI and their HANDLER(S)

38

THE FORENSIC ANALYST

What your Theory of this witness?

Lack of training and/or qualifications

Doesn't know the science behind the testing (perhaps a pretrial DAUBERT issue)

The testing methods used or not used

The MACHINES

Prepare with Motions for Maintenance and Repair Logs

Craft your narrative around these areas

39



40

- **TIMEOUT** or talk to the **HAND**
- **REPEAT** it
- **WORD FOR WORD, THE EXACT STATEMENT**
- **GO** slow, painfully slow, rising inflection
- Use witness' **FULL** name (only for **FUN!**)
- The answer is **YES**
- Then its not **X** or it isn't **X**
- I know you want to say (or tell me) "**X**" but my question is ...
- Is that a question?
- Ahh Yes.

41

- VERISIMILITUDE**
- The appearance of being true or real.
 - In terms of a witness, **YOU MUST** understand and accept where the witness is **EMOTIONALLY**
 - *Accept their reality but not their conclusion*
 - Then ask those Qs that hold that emotional center
 - Allows us to turn facts into things jurors can see and feel
 - "I understand nothing I ask you is going to change your mind about what you said, claim, etc., but I'm going to ask you Qs about...."

42

CHECK YOUR ATTITUDE

- Think CLINICALLY at the beginning
- Spock or Road House (“Be Nice until its time not to be nice.”) keep your emotions in check
- Watch, Listen, Identify and Accept and then react (if necessary)
- Set your volume, speed and pace during questioning
- Be aware of your body language, re-center yourself
- Move with purpose and remember – Patient but Firm

43

CROSS EXAMINATION: SCIENCE AND TECHNIQUES by Larry S. Posner and Roger J. Dodd (Michie 1993)

MACCARTHY ON CROSS-EXAMINATION by Terence F. MacCarthy (ABA Publishing 2007) –

DYNAMIC CROSS EXAMINATION by James H. McComas, (Trial Guides LLC 2011)

44



45

THE "YES" GAME

Cross the witness, only by what you **SEE**

Only "YES" answers

Only "FACTS" not assumptions or interpretations

Use the technique, 1 fact or 1 new fact per statements only, general to the specific

Don't repeat previously made statements unless adding a new fact

Last Lawyer standing is the WINNER!
